

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 130321272-5109-03]

RIN 0648-XC589

Listing Endangered or Threatened Species: Amendment to the Endangered Species Act

Listing of the Southern Resident Killer Whale Distinct Population Segment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: On January 25, 2013, we, NMFS, received a petition submitted by the People for the Ethical Treatment of Animals Foundation to remove the exclusion of captive animals from the endangered species listing of Southern Resident killer whale DPS, as well as, recognize the captive killer whale (Orcinus orca) “Lolita” as a protected member of the endangered Southern Resident killer whale Distinct Population Segment (DPS). We completed a status review and published a proposed rule, and we are now amending the regulatory language of the Endangered Species Act (ESA) listing of the DPS by removing the exclusion for captive members of the population. We have further determined that Lolita, a female killer whale captured from the Southern Resident killer whale population in 1970 who resides at the Miami Seaquarium in Miami, Florida, is not excluded from the Southern Resident killer whale DPS due to her captive status.

We proposed to amend the regulatory language of the ESA listing to remove the exclusion for captive whales from the Southern Resident killer whale DPS on January 27, 2014. Additionally, we solicited scientific and commercial information pertaining to the proposed rule and also conducted a peer review of the status review information on Lolita that informed the proposed rule. We have determined that captive members of the Southern Resident killer whale population should be included in the listed Southern Resident killer whale DPS. This rule amends the regulatory language of the listing to remove the exclusion for captive members of the DPS.

DATES: This final rule becomes effective on [Insert date 90 days from the date of publication in the FEDERAL REGISTER].

ADDRESSES: Information supporting this final rule can be found on our web site at: http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/lolita_petition.html.

Or in our office at:

- Protected Resources Division, NMFS, Northwest Region, Protected Resources Division, 7600 Sand Point Way NE. Attention Lynne Barre, Branch Chief.

FOR FURTHER INFORMATION CONTACT: Lynne Barre, NMFS Northwest Region, (206) 526-4745; Marta Nammack, NMFS Office of Protected Resources, (301) 427-8469.

SUPPLEMENTARY INFORMATION:

ESA Statutory Provisions and Policy Considerations

On January 25, 2013, we received a petition submitted by the People for the Ethical Treatment of Animals Foundation on behalf of the Animal Legal Defense Fund,

Orca Network, Howard Garrett, Shelby Proie, Karen Munro, and Patricia Sykes to remove the exclusion of captive whales from the SRKW DPS ESA listing and to include the killer whale known as Lolita in the ESA listing of the Southern Resident killer whales. Lolita is a female killer whale captured from the Southern Resident population in 1970, who currently resides at the Miami Seaquarium in Miami, Florida. Copies of the petition are available upon request (see ADDRESSES, above).

In accordance with section 4(b)(3)(A) of the ESA, to the maximum extent practicable within 90 days of receipt of a petition to list, reclassify, or delist a species, the Secretary of Commerce is required to make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the Federal Register (16 U.S.C. 1533(b)(3)(A)). The Secretary of Commerce has delegated this duty to NMFS. If we find that the petition presents substantial information indicating that the petitioned action may be warranted, we must commence a review of the status of the species concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. On April 29, 2013 we made a finding (78 FR 25044) that there was sufficient information indicating that the petitioned action may be warranted and requested comments to inform a status review.

After accepting a petition and initiating a status review, within 12 months of receipt of the petition we must conclude the review with a determination that the petitioned action is not warranted, or a proposed determination that the action is warranted. Under specific facts, we may also issue a determination that the action is warranted but precluded. On January 27, 2014 we made a finding (79 FR 4313) that the

petitioned action to remove the exclusion of captive killer whales from the ESA listing of the Southern Resident killer whale DPS and to include captive killer whales in the ESA listing of the Southern Resident killer whale DPS was warranted and proposed to amend the regulatory language describing the DPS by removing the current exclusion for captive whales. Within 12 months of issuing a proposed rule on a listing determination, we must publish a final regulation to implement the determination or publish a notice extending the 12-month period. This notice is a final rule to implement our determination that the petitioned action is warranted and to amend the language describing the endangered listing of the Southern Resident killer whale DPS by removing the exclusion for captive whales.

Under the ESA, the term “species” means a species, a subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532(16)). A joint NMFS-U.S. Fish and Wildlife (USFWS) policy clarifies the Services' interpretation of the phrase “Distinct Population Segment,” or DPS (61 FR 4722; February 7, 1996). The DPS Policy requires the consideration of two elements when evaluating whether a vertebrate population segment qualifies as a DPS under the ESA: (1) Discreteness of the population segment in relation to the remainder of the species/taxon, and, if discrete; (2) the significance of the population segment to the species/taxon.

A species is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Thus, we interpret an “endangered species” to be one that is presently in danger of extinction. A “threatened

species," on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future (that is, at a later time). In other words, the primary statutory difference between a threatened species and an endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened). Pursuant to the ESA and our implementing regulations, we determine whether a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: the present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

We make listing determinations based on the best available scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any State or foreign nation or political subdivision thereof to protect the species.

Background

Three distinct forms or ecotypes of killer whales, termed residents, transients, and offshores, are recognized in the northeastern Pacific Ocean. Resident killer whales in U.S. waters are distributed from Alaska to California, with four distinct populations: Southern, Northern, Southern Alaska, and Western Alaska (Krahn et al., 2002; 2004). Resident killer whales are fish eaters and live in stable matrilineal pods. The West Coast transient killer whales have a different social structure, are found in smaller groups, and eat marine mammals. Offshore killer whales are found in large groups, and their diet is

presumed to consist primarily of fish, including sharks. While the ranges of the different ecotypes of whales overlap in the northeastern Pacific Ocean, available genetic data indicate that there is a high degree of reproductive isolation among residents, transients, and offshores (Krahn et al., 2004; NMFS, 2013).

The Southern Resident killer whale population consists of three pods, identified as J, K, and L pods, that reside for part of the year in the inland waterways of Washington State and British Columbia (Strait of Georgia, Strait of Juan de Fuca, and Puget Sound), principally during the late spring, summer, and fall (NMFS, 2008). Pods visit coastal sites off Washington and Vancouver Island, and travel as far south as central California and as far north as Southeast Alaska (Ford et al., 2000; NMFS, 2008; Department of Fisheries and Oceans, unpublished data).

In 2001 we received a petition to list the Southern Resident killer whale population as threatened or endangered under the ESA (CBD, 2001) and we formed a Biological Review Team (BRT) to assist with a status review (NMFS, 2002). After conducting the status review, we determined that listing the Southern Resident killer whale population as a threatened or endangered species was not warranted because the science at that time did not support identifying the Southern Resident killer whale population as a DPS as defined by the ESA (67 FR 44133; July 1, 2002). Because of the uncertainties regarding killer whale taxonomy (i.e., whether killer whales globally should be considered as one species or as multiple species and/or subspecies), we announced that we would reconsider the taxonomy of killer whales within 4 years. Following the determination, the Center for Biological Diversity and other plaintiffs challenged our “not warranted” finding under the ESA in U.S. District Court. The U.S. District Court for the

Western District of Washington issued an order on December 17, 2003, which set aside our “not warranted” finding and remanded the matter to us for redetermination of whether the Southern Resident killer whale population should be listed under the ESA (Center for Biological Diversity v. Lohn, 296 F. Supp. 2d. 1223 (W.D. Wash. 2003)). The court found that where there is “compelling evidence that the global Orcinus orca taxon is inaccurate,” the agency may not rely on “a lack of consensus in the field of taxonomy regarding the precise, formal taxonomic redefinition of killer whales.” As a result of the court’s order, we co-sponsored a Cetacean Taxonomy workshop in 2004, which included a special session on killer whales, and reconvened a BRT to prepare an updated status review document for Southern Resident killer whales (NMFS, 2004).

The BRT agreed that the Southern Resident killer whale population likely belongs to an unnamed subspecies of resident killer whales in the North Pacific, which includes the Southern and Northern Residents, as well as the resident killer whales of Southeast Alaska, Prince William Sound, Kodiak Island, the Bering Sea and Russia (but not transients or offshores). The BRT concluded that the Southern Resident killer whale population is discrete from other populations within the North Pacific Resident taxon and significant with respect to the North Pacific Resident taxon and therefore should be considered a DPS. In addition, the BRT conducted a population viability analysis, which modeled the probability of species extinction under a range of assumptions. Based on the findings of the status review and an evaluation of the factors affecting the DPS, we published a proposed rule to list the Southern Resident killer whale DPS as threatened on December 22, 2004 (69 FR 76673). After considering public comments on the proposed rule and other available information, we reconsidered the status of the Southern Resident

killer whale DPS and issued a final rule to list the Southern Resident killer whale DPS as endangered on November 18, 2005 (70 FR 69903). The regulatory language in the listing limited the DPS to whales from J, K and L pods, wherever they are found in the wild, and not including Southern Resident killer whales placed in captivity prior to listing or their captive born progeny.

Following the listing, we designated critical habitat, completed a recovery plan, and conducted a 5-year review for the Southern Resident killer whale DPS. We issued a final rule designating critical habitat for the Southern Resident killer whale DPS on November 29, 2006 (71 FR 69055). After engaging stakeholders and providing multiple drafts for public comment, we announced the Final Recovery Plan for the Southern Resident killer whale DPS on January 24, 2008 (73 FR 4176). We have continued working with partners to implement actions in the recovery plan. In March 2011, we completed a 5-year review of the ESA status of the Southern Resident killer whale DPS, concluding that no change was needed in its listing status and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS, 2011). The 5-year review also noted that there was no relevant new information for this species regarding the application of the DPS policy.

On August 2, 2012, we received a petition submitted by the Pacific Legal Foundation on behalf of the Center for Environmental Science Accuracy and Reliability, Empresas Del Bosque, and Coburn Ranch to delist the endangered Southern Resident killer whale DPS under the ESA. We made a 90-day finding accepting the petition and soliciting information to inform a status review (77 FR 70733; November 27, 2012). Based on a review of the scientific information (NWFSC, 2013) and our full status

review, we issued a 12-month finding on August 5, 2013, that the petitioned action was not warranted and the Southern Resident killer whale DPS remains listed as endangered (78 FR 47277).

Lolita Petition

On January 25, 2013, we received a petition submitted by the People for the Ethical Treatment of Animals Foundation on behalf of the Animal Legal Defense Fund, Orca Network, Howard Garrett, Shelby Proie, Karen Munro, and Patricia Sykes to remove the exclusion of captive killer whales from the ESA listing of the Southern Resident Killer Whale DPS and to include the killer whale known as Lolita in the ESA listing of the Southern Resident killer whales. The petition described Lolita, a female killer whale captured from the Southern Resident population in 1970, who currently resides at the Miami Seaquarium in Miami, Florida, as the only remaining member of the Southern Residents alive in captivity. The petitioners presented information about Lolita's origin and contended that Lolita is a member of the endangered Southern Resident DPS and should be included within the ESA listing. In addition, they provided a legal argument that "the ESA applies to captive members of listed species" and asserted that "NMFS has a non-discretionary duty to include Lolita in the listing of the Southern Resident killer whales under the ESA." The petition also included information about how each of the five section 4(a)(1) factors applies with respect to Lolita. Lastly, the petitioners contended that including Lolita in the ESA listing will contribute to conservation of the wild Southern Resident killer whale population.

On April 29, 2013, we found that the information contained in the petition, viewed in the context of information readily available in our files, presented substantial

scientific information that would lead a reasonable person to believe the petitioned action may be warranted (78 FR 25044). We noted that the information on Lolita's genetic heritage and consideration of captive individuals under the ESA provided a basis for us to accept the petition. The petition included an assessment of how listing Lolita would help conserve the wild Southern Resident population and also a review of the 4(a)(1) factors described earlier and considered in listing determinations. Our 90-day finding accepting the petition, however, was based on the biological information regarding Lolita's genetic heritage and consideration of the applicability of the ESA to captive members of endangered species. Our review of Lolita's status with respect to the Southern Resident killer whale DPS similarly focused on these two aspects and did not include a review of the Section 4(a)(1) factors for Lolita or the wild population. Our status review considered the best available information including information received through the public comment period, a review of scientific information conducted by our Northwest Fisheries Science Center, including published peer-reviewed journal articles and unpublished scientific reports, and information in the petition.

Upon publishing our 90-day finding accepting the petition, we initiated a status review update and solicited information from the public to help us gather any additional information to inform our review of Lolita's relationship to the Southern Resident killer whale DPS. Based on the information informing the 90-day finding, the status review update, and the public comments on the 90-day finding, we published a proposed rule on January 27, 2014 (79 FR 4313), proposing to amend the regulatory language of the ESA listing of the DPS by removing the exclusion for captive members of the population and requesting comments.

During the public comment period for the proposed rule, which closed on March 28, 2014, we received over 17,000 comments from citizens, researchers, non-profit organizations, and the public display industry; comments came from the United States and around the world. While we solicited information concerning the proposal to amend the regulatory language describing the listing of the Southern Resident killer whale DPS by removing the exclusion of captive whales and Lolita's genetic heritage and status, the vast majority of individual commenters simply stated their support for the proposal to include Lolita as a member of the Southern Resident killer whale DPS. Along with support for the proposed rule or as a stand-alone comment, many commenters suggested that Lolita be freed from her captivity and returned to her native waters of the Pacific Northwest. Commenters also expressed concern over Lolita's current care at the Miami Seaquarium under the purview of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) under the Animal Welfare Act (AWA). The AWA captive care requirements are not under NMFS jurisdiction and are beyond the scope of our response to the petition; thus, comments pertaining to AWA compliance are not addressed in this final rule.

In addition to a very large number of brief comments in support of the proposed rule, we received over 60 detailed comments raising substantive issues. The majority of these comments provided substantive support for recognition of Lolita as a member of the listed DPS. Several substantive comments, primarily submitted by groups or individuals associated with the public display industry, opposed the proposed rule, with several also opposing any relocation of Lolita.

In addition to public review, we solicited peer review of information about Lolita's heritage supporting our conclusion in the proposed rule that Lolita originated from the Southern Resident killer whale population. On July 1, 1994, the NMFS and USFWS published a series of policies regarding listings under the ESA, including a policy for peer review of the scientific data (59 FR 34270). The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Pursuant to our 1994 policy on peer review, the Data Quality Act, and the Office of Management and Budget (OMB) Peer Review Bulletin (OMB 2004), we solicited technical review from four qualified specialists of specific information regarding Lolita's heritage and our conclusion that she originated from the Southern Resident killer whale population as described in our status review update (NMFS, 2013). A status review of biological information and our DPS determination was conducted by the NMFS Northwest Fisheries Science Center in response to the petition to delist the Southern Resident killer whale DPS and included a review of information specific to Lolita's genetic heritage (NMFS, 2013). The peer review request focused on the specific paragraph regarding Lolita in the status review update (NMFS, 2013) that informed the proposed rule, and we received reviews from two independent experts. We received one comment on the peer review plan and peer review charge statement and provided that comment letter to the peer reviewers. We made the peer review charge, comments received on the peer review charge, and ultimate peer review report available online at: http://www.cio.noaa.gov/services_programs/prplans/ID261.html. The peer reviewer comments and conclusions and our responses to public comments are included in the summary below.

Summary of Peer Review and Public Comments Received

Below we summarize and address the substantive public comments that were received during the public comment period for the proposed rule. In addition, information from the peer reviews is presented in both comment summaries and responses. Substantive comments and our responses are organized by relevant topics.

Biological Information on Lolita's Origin

Comment 1: Several commenters and the two peer reviewers noted that the best available scientific information indicates that Lolita is most likely a member of the Southern Resident population. Many commenters cited the acoustic and genetic evidence provided in the proposed rule as proof that Lolita is a member of the Southern Resident community. Commenters cited the references in the status review update, including Hoelzel et al. (2007), Hoelzel (personal communication), Ford (1987), Candice Emmons (personal communication), and Pilot et al. (2010) (also referred to as Pilot (2009) in some comments). Commenters cited Pilot et al. (2010) as evidence that Lolita is related to Southern Residents using one genetic method, while others referenced the same paper noting that three other genetic methods did not indicate a relationship with Southern Residents. One commenter addressed the sample assigned to Lolita in Pilot et al. (2010), referenced personal communications with the lead author of the paper, and noted that results from the tests are insufficient to conclude that Lolita was a Southern Resident killer whale. In addition to the papers listed above, the peer reviewers also provided additional references to support their conclusions that Lolita is most likely a member of the Southern Resident population. One peer reviewer noted that our summary in the status review update (NMFS, 2013) was overly simplistic. The comments on the peer

review plan focused on individual data points and the uncertainties for individual genetic tests and requested additional information be provided to the peer reviewers.

Response: We considered the best available information regarding Lolita's origin, including genetic test results from multiple papers, the peer reviews, and other lines of evidence in making our conclusions. In addition to the original peer review request, we also provided comments on the peer review plan and additional information for the reviewers to consider. The peer reviewers stated that mitochondrial DNA (mtDNA) tests are very likely diagnostic of natal populations. The mtDNA control region sequence is fixed for a single haplotype within most killer whale populations in the North Pacific. Lolita has the haplotype for Southern Residents, and the haplotype is distinct from the haplotypes found in transient, offshore and Northern Resident communities (including SE Alaska and Bering Sea). Based on sample sizes in studies to date, it is extremely unlikely that transient or Northern Residents have a Southern Resident haplotype that has gone undetected due to chance. Due to smaller sample sizes for offshores, it is harder to rule out that offshores might contain the Southern Resident haplotype in a small fraction of the population (i.e., 10 percent), but it has yet to be detected. The Southern Resident haplotype is shared with whales sampled off the Kamchatka Peninsula in Russia and from Prince William Sound in Alaska (Barrett-Lennard, 2000; Parsons et al., 2013); however, additional data can be used to rule out the possibility that Lolita originated from these other populations. Using microsatellite analysis, researchers assigned Lolita to populations using different programs with varying probabilities and assessed kinship (Hoelzel et al., 2007; Pilot et al., 2010). In Pilot et al. (2010), Lolita was assigned to the Southern Resident population with the highest

probability (0.464) and with low probability to Kamchatka (0.016) or SE Alaska residents (0.004). Tests for kinship using microsatellite data found a presumed match between Lolita and a member of the Southern Resident L pod based on one of four tests, but it was not a close relationship (e.g., parent, offspring, or full sibling). Lolita did not show potential kinship with individuals of any other population. Using a different analysis, Pilot et al. (2010) also assigned Lolita to a Southern Resident cluster and not to the Kamchatka cluster. The microsatellite data do not appear to provide conclusive evidence on their own to identify Lolita's population of origin, but the data support the finding that she is a Southern Resident.

The peer reviews concluded that the summary of our findings regarding Lolita in our status review update (NMFS, 2013) likely correctly concluded that Lolita is a Southern Resident and that, taken together, the mtDNA and microsatellite DNA provide a strong case for the assignment of Lolita to the Southern Resident population. While some comments focused on individual test results to form conclusions, we relied on all of the best available information in the petition, public comments on the 90-day finding and the proposed rule, peer review, peer reviewed journal articles, unpublished science reports, and the recovery plan (NMFS, 2008), taken together, to inform our internal review and conclusions. Based on the best available information regarding the location of capture and genetic information, we are confident that Lolita originated from the Southern Resident population.

Comment 2: One commenter provided information from her study of the specific acoustic call type produced by Lolita, matching Lolita's calls to Southern Resident specific call types. The commenter suggested that further identification of Lolita's calls

could be matched with specific matriline. Other commenters noted that there is no statistically significant or peer reviewed data or analysis that the calls recorded opportunistically from Lolita match L pod calls. In addition, commenters noted that the Ford (1987) paper cited in the status review did not include specific information about Lolita and her calls. One peer reviewer noted that additional information about the timing of the recording of Lolita's calls and the origin of the whale sharing Lolita's tank would shed light on whether Lolita was an L pod whale or if she could have learned L pod calls from another whale.

Response: In the status review update (NMFS, 2013), the Ford (1987) paper was cited to demonstrate that calls can be identified to population and also to pod, and we acknowledge that it does not include specific information about Lolita's calls. While the acoustic information about Lolita's calls is not published in a peer reviewed article, the personal communication by Candice Emmons does lend an additional line of evidence that is consistent with Lolita originating from the Southern Resident killer whale population. The study provided by a commenter is also not a peer reviewed published article. In addition, the peer review comments also raised uncertainty about identifying Lolita by her acoustic calls based on the personal communication. While we considered the anecdotal and unpublished information on Lolita's acoustic calls, noting the uncertainty surrounding them, we relied on the genetic data and capture location as the primary support for Lolita's status as a member of the Southern Resident killer whale population.

Comment 3: In addition to genetic and acoustic information, Lolita's capture history was also mentioned by commenters and peer reviewers as evidence that she came

from the Southern Resident population. One commenter noted photographs from the capture operation were identified as Southern Residents and that members of different communities have never been observed associating, concluding that all of the whales captured at Penn Cove were members of the Southern Resident community. One commenter, however, noted that the capture history raised questions about Lolita's origin, mentioning that the total number of whales in the area was too high to account for only the Southern Residents and that L pod whales were photographed near the operation but not in the net. The peer reviewers referenced the sighting history of killer whales in the capture area as support for Lolita's identification as a Southern Resident.

Response: We did not receive any photo-identification quality photographs of the capture and have no specific documentation of the captures beyond the information summarized in the Recovery Plan for Southern Resident Killer Whales (NMFS, 2008) that attributes captures from Penn Cove, Washington, to the Southern Resident population. One peer reviewer noted the location of capture does not rule out that she is a transient (but mtDNA makes this highly unlikely), and that the capture location makes it highly unlikely that she is a Northern Resident, offshore, Western Pacific, Alaska Resident or from a distant, poorly known population. A review of the information raised in public comments, the peer reviews, comments on the peer review plan, and other available information finds this information continues to find the capture information regarding Lolita consistent with her membership as a Southern Resident. That review (Ford, 2014) notes that based on what is known about the ranges of North Pacific killer whales, the Penn Cove, WA capture location limits the possible populations of origin to Southern Residents or transients which are commonly seen, or far less likely to Northern

Residents (only seen a handful of times in U.S. waters of the Salish Sea) or offshores (only sighted six times in 30 years of observations and never south of Admiralty Inlet) (Krahn et al., 2004; Ford, 2006; Dahlheim et al., 2008). Regular observations in the Salish Sea have occurred since the mid-1970s, several years after the capture in question, and it seems highly unlikely that the distributions and habits of these populations would change dramatically over that short period of time (Ford, 2014).

Comment 4: Several commenters noted that, morphologically, Lolita's saddle patch patterns do not readily match the majority of saddle patch patterns of the Southern Resident DPS, but they are more similar to saddle patches of the Alaska and Bering Strait residents. One peer reviewer suggested saddle patch and dorsal fin shape could be used to further address Lolita's origin.

Response: Bain (1988) found differences between Northern and Southern Resident saddle shapes and Baird and Stacey (1988) reported different distributions of saddle shapes among residents and transients. Baird and Stacey (1988) identified five different patterns, with all five patterns present in resident killer whales. Lolita's saddle shape appears to be consistent with the "horizontal notch" type. While this saddle patch type is seen in Alaska Residents, it is more common in Southern Residents (Baird and Stacey, 1988). The information above regarding sighting records and the capture location includes an assessment by a peer reviewer, noting that it is highly unlikely that Lolita is an Alaska Resident.

Comment 5: Several commenters reviewed the ESA section 4(a)(1) factors and identified how they applied to Lolita. Other commenters noted that none of the threats

identified in the listing of the Southern Resident killer whale DPS (i.e., food scarcity, vessels, contaminants) apply to Lolita.

Response: In March 2011, we completed a 5-year review of the ESA status of the Southern Resident killer whale DPS, concluding that no change was needed in its listing status and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS, 2011). The endangered status of the DPS is not the subject of the petitioned action. The petition requests we include Lolita in the ESA listing of Southern Residents and notes that an analysis of the five ESA section 4(a)(1) factors is not required to justify Lolita's inclusion in the DPS and that Lolita's genetic heritage is sufficient to support her inclusion in the listing. We agree that biological information regarding Lolita's origin and consideration of the applicability of the ESA to captive members of endangered species provide a sufficient basis for our determination and, therefore, do not include a review of the section 4(a)(1) factors for Lolita or the wild population in this notice.

Captivity and Release

Comment 6: One commenter questioned why the ESA applied to Lolita at all, considering she was held in captivity prior to December 28, 1973, and the date of the listing of the Southern Resident killer whales.

Response: The commenter presumably refers to section 9(b) of the ESA, 16 U.S.C. 1538(b)(1), which provides certain exemptions for animals already held in captivity or a controlled environment on either December 28, 1973, or the date of publication in the Federal Register of the final regulation adding such species to the list

of endangered species, provided that such holding and any subsequent holding of the animal is not in the course of a commercial activity.

In fact, this section is not a blanket exemption from the ESA for any animal so held; rather, it only lifts the ban on two very specific activities enumerated in subsections (a)(1)(A) and (G) of section 9: import or export of such species, and violation of any regulation pertaining to such species or to any threatened species. In other words, all of the other prohibitions of section 9 apply to animals that were held in captivity pre-ESA or pre-listing, including the prohibitions on take as well as on interstate or foreign commerce. Any import or export of Lolita that might be proposed in the future is beyond the scope of this rulemaking. For additional discussion of ESA section 9(b), see American Society for the Prevention of Cruelty to Animals v. Ringling Brothers and Barnum and Bailey Circus, 502 F.Supp. 2d 103 (2007).

Comment 7: Several commenters noted that the ESA does not allow for the exclusion of captive members from a listed species based on their captive status and referenced court cases (Safari Club International v. Jewell and Alsea Valley Alliance v. Evans, cited below in response) and recent USFWS notices regarding antelopes and chimpanzees that were referenced in the proposed rule. In addition, commenters noted that if Lolita is included in the listing, the ESA prohibitions on export, take, and interstate commerce will apply to her.

Response: As the commenters note, several courts have held, and NMFS agrees, that the ESA does not allow for captive held animals to be assigned separate legal status from their wild counterparts on the basis of their captive status or through designation as a separate DPS (Safari Club International v. Jewell, 960 F.Supp. 2d 17 (D.D.C. 2013);

Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D.Or. 2001). As noted in this final rule, as well as in recent regulations addressing captive antelopes (78 FR 33790; June 5, 2013) and a proposed rule for chimpanzees (78 FR 35201; June 12, 2013), captive members of a species have the same legal status as the species as a whole. Finally, as the commenters note, captive members of a listed species are also subject to the relevant provisions of section 9 of the ESA as warranted.

Comment 8: One commenter expressed concern that including Lolita in the ESA listing would result in a violation of the Fifth Amendment, denying the property owners their rights without satisfying the Constitution’s public use and just compensation requirements. One commenter supported their opposition to including Lolita in the ESA listing by citing examples of how extending regulations to privately owned members of a listed species could undermine private efforts to avoid extinction and recover species through private governance. Commenters also noted that financial considerations should not be considered in listing decisions.

Response: First, section 4(b)(1)(A) of the ESA and its legislative history provides that listing decisions be based “solely” on the best scientific and commercial data available without reference to economic costs or private party impacts (H.R. Rep. No.97-567, at 12, 1982 U.S.C.C.A.N. 2807, 2812). Second, to the extent there are concerns about specific activities (including acts supporting conservation) associated with listed species, these issues are better evaluated in the context of a specific permit request and through the section 10 permit process, which provides an avenue for defining, evaluating, and authorizing specific activities (50 CFR 222.301 et seq.). Accordingly, speculating

about whether there are activities that property owners may wish to take is beyond the scope of this rule.

Comment 9: One commenter took issue with our assertion that if Lolita was included in the ESA listing, we would not seek to amend critical habitat to include consideration of her or her captive environment. The commenter cited the requirement to designate critical habitat with the listing of a species in section 4(a)(3)(A) of the ESA.

Response: NMFS designated critical habitat for the Southern Resident killer whale DPS on November 29, 2006 (71 FR 69054). NMFS interprets critical habitat to comprise the habitat used by the species in the wild, not the artificial surroundings of a particular species member in captivity, because those areas do not include relevant primary constituent elements of critical habitat (70 FR 52630; September 2, 2005). Accordingly, we do not intend to amend the existing critical habitat designation for Southern Resident killer whales with respect to Lolita.

Comment 10: We received many comments addressing the type and scope of activities that might trigger section 9 concerns and/or warrant consideration for a section 10 permit. These comments took varying positions on the scope of activities that might fall within the category of allowable captive care activities.

Response: In the proposed rule, we said that, depending on the circumstances, we would likely not find continued possession, care, and maintenance of a captive animal to be a violation of ESA section 9 (and therefore, such activities would not require a section 10 permit). Our discussion in the proposed rule was intended to be a general indication of our views, not factual findings on Lolita's actual circumstances or any proposals for future activities. Such findings are beyond the scope of this listing rule.

We appreciate the concerns raised by the many comments regarding how the ESA section 9 prohibitions might apply to Lolita's particular circumstances. We believe these comments demonstrate the need for a more focused evaluation of these factors, which is more appropriately performed as part of a permit application process as opposed to this listing rule. Should the Miami Seaquarium apply for an ESA section 10 permit, the process would involve a Federal Register notice of receipt followed by a public comment period.

Comment 11: Commenters raised questions about the Miami Seaquarium conducting commercial activity with Lolita, stating their belief that section 9(b) of the ESA allows for captives to remain in captivity so long as they are not held or used for purposes of commercial activity. Other commenters stated that there is nothing illegal about exhibiting endangered animals for a fee.

Response: Some commenters may have misinterpreted section 9(b) in this regard. As noted above, section 9(b) is a very limited exclusion from the prohibition on import and export, as well as certain regulatory requirements not applicable here. Any future proposal to import or export Lolita is beyond the scope of this rule, and so we need not further address the 9(b) exemption, including its clause regarding commercial activity, at this time.

Comment 12: One commenter urged us to acknowledge that interstate movement of Lolita or any other captive listed species merely for display or as part of an animal exhibition would not require a permit under the ESA, citing U.S.C. 1538(a)(E) and 50 CFR 17.3.

Response: At this time, the Miami Seaquarium has not presented any proposal to move Lolita, regardless of purpose, so we will not address this further in this listing rule, other than to note that the cited CFR provision is a regulation promulgated by the USFWS, and is therefore applicable to species under their jurisdiction.

Comment 13: Commenters expressed concern over captivity of killer whales in general and about Lolita's current care at the Miami Seaquarium under the purview of APHIS under AWA. Other commenters noted the high level of care provided to Lolita at the Miami Seaquarium.

Response: As noted above, Lolita's current captive care requirements are regulated by APHIS under the AWA and are currently the subject of ongoing litigation (Animal Legal Defense Fund et al. v. Elizabeth Goldentyer, USDA and Marine Exhibition Corporation No. 14-12260 (11th Circuit Court of Appeals 2014)). Specific AWA captive care requirements are not under NMFS jurisdiction and are beyond the scope of our response to the petition. Therefore, comments regarding AWA compliance are not addressed in this final rule.

Comment 14: Many comments supported Lolita's transfer to a sea pen or release from captivity into her home waters. Some commenters, while in favor of Lolita's ultimate release, argued that any decision on this issue in the absence of a specific proposal is premature. Comments on whether there would be any conservation benefit to the conservation of wild killer whales from Lolita's release were mixed. Some comments identified benefits to Lolita and to the wild Southern Resident killer whale population, such as her ability to aid in the care of young whales (i.e., alloparenting). Others were against any relocation efforts, claiming that there would be no conservation benefits to

wild whales and noting Lolita currently has a high level of care, contributes to educating the public, and there are risks to Lolita and the wild population associated with transport and release. One commenter noted that regulations regarding marine mammal rehabilitation under the MMPA declare that a marine mammal that has been in human care for 2 or more years is presumptively non-releaseable.

Response: As noted above, the Miami Seaquarium has not presented any proposal to move (or release) Lolita. As for any future proposal to release her, we indicated in the proposed rule that there were certain activities that we believe could result in violations of section 9 of the ESA, specifically including “releasing a captive animal into the wild.” 79 FR at 4318 (January 27, 2014). We based this on our proposed rule listing five species of sturgeon (since finalized at 79 FR 31222, June 2, 2014). After taking into account the numerous comments on this topic, and examining our existing regulations, policies and practices, we have decided to elaborate on our views in this final rule. Releasing captive marine mammals to the wild is not without risk. Issues of concern include: disease transmission and/or unwanted genetic exchange between released animals and wild stocks; the ability of released animals to adequately forage and defend themselves from predators; and any behavioral patterns developed in captivity that could affect the social behavior of wild animals, as well as the social integration of the released animals.

In fact, as one commenter noted, NMFS’ MMPA regulations address a presumption of non-releasability, as well as dictate legal requirements under the MMPA for any proposal to release a captive animal. First, 50 CFR 216.27(a)(1)(iii), addressing stranded marine mammals, states that the animal’s potential for survival in the wild must

be evaluated at 6-month intervals, “until 24 months from capture or import, at which time there will be a rebuttable presumption that release to the wild is not feasible.” Second, 50 CFR 216.35(e) states: “Captive marine mammals shall not be released into the wild unless specifically authorized by the Office Director under a scientific research or enhancement permit.”

The issues surrounding any release of Lolita to the wild are numerous and complex and are not ripe for analysis in this listing rule. Such issues would be more appropriately evaluated in the context of a specific section 10 permit application. Any such process would include rigorous review by the scientific community, the Marine Mammal Commission, and the public, and be subject to an associated NEPA analysis, prior to action being taken.

Changes from the Proposed Rule

There are no changes from the proposed amendment to the ESA listing of the Southern Resident killer whale DPS in this final rule. This final rule implements the amendment to the listing language, removing the exclusion for captive whales from the regulatory description of the Southern Resident killer whale DPS. The public comments provided opposing positions on this approach, as well as Lolita’s status as a member of the Southern Resident killer whale population. The peer reviews supported Lolita’s status as a member of the Southern Resident killer whale population. See the Summary of Peer Review and Public Comments Received section above and the Final Determination and Amendment to Listing section below for information on the additional data that support the conclusion that captive members should be included in the listing

and the determination that best available science supports Lolita's status as a member of the Southern Resident killer whale population and therefore the ESA-listed DPS.

Determination of Taxon and DPS

Based on the best information available, we previously concluded, with advice from the 2004 BRT (Krahn et al., 2004), that the Southern Resident killer whale population (J, K, and L pods) met the two criteria of the DPS policy (discreteness and significance) and constituted a DPS of the North Pacific Resident subspecies. A detailed analysis of (1) the reference taxon for consideration under the DPS policy, (2) the discreteness of the Southern Resident population from other populations within that taxon, and (3) the significance of the Southern Resident population to that taxon was included in our 12-month determination that the petition to delist was not warranted (78 FR 47277; August 5, 2013) and is summarized below. Based on our recent status review and in response to a petition to delist the Southern Resident killer whale DPS, we concluded that the best available scientific information indicates that, similar to our 2005 rulemaking when we listed the Southern Resident DPS, the North Pacific Resident subspecies is the appropriate reference taxon for considering whether the Southern Resident killer whale population is discrete and significant. In our 2005 rulemaking we concluded there was strong evidence that the Southern Resident killer whale population is discrete from other North Pacific Resident killer whale populations as defined by the 1996 DPS policy. The new information subsequent to 2004, such as recent genetic studies, is consistent with and generally strengthens the conclusion that the Southern Resident killer whale population is a discrete population within the North Pacific Resident taxon. As in 2004, all the available information clearly indicates that the

Southern Resident population is discrete from other populations in the North Pacific resident subspecies. In addition, we concluded that the new information on genetics and behavioral and cultural diversity available since 2004 was consistent with or strengthens the 2004 BRT's conclusion that the Southern Resident killer whale population meets the significance criterion of the DPS policy. In summary, in our 12-month finding that delisting was not warranted, we concluded that members of the Southern Resident killer whale population are discrete from other populations within the North Pacific Resident killer whale taxon and significant with respect to the North Pacific Resident killer whale taxon and therefore comprise a valid DPS which remains listed as endangered (78 FR 47277; August 5, 2013).

Final Determination and Amendment to Listing

The petition maintains that Lolita is a member of the Southern Resident killer whale population and states that she must, therefore, be included in the listed DPS. As summarized above, our consideration of the petitioned action focuses on biological information regarding Lolita's genetic heritage and the application of the ESA to captive members of a listed species or DPS. The petitioners contend that Lolita was taken from L pod during captures on August 8, 1970, in Penn Cove, approximately 50 miles (80 km) north of Seattle, Washington. The peer reviewers referenced the capture location and sighting history of different populations, in addition to other information (i.e., genetics), to support their conclusions that Lolita most likely came from the Southern Resident population. The petition notes that Lolita's mother is believed to be L25, an adult female Southern Resident killer whale who remains in the wild, and that Lolita makes the unique calls of the L25 subpod. In our recent status review update (NMFS, 2013), we cited

genetic analysis completed since the original 2005 listing, that indicates Lolita has a genotype consistent with a Southern Resident origin (Hoelzel et al., 2007; Hoelzel, personal communication), and we noted that Lolita's acoustic calls are typical of L pod (Ford, 1987; Candice Emmons, personal communication). The status review update (NWFSC, 2013) also cites information in Pilot et al. (2010). As described above, in support of the DPS determination for Southern Resident killer whales, recent genetic studies all indicate that the Southern Resident population is significantly differentiated and there is a high degree of reproductive isolation from other resident populations that comprise the North Pacific Resident subspecies.

As described above in the response to comments, the peer reviewers identified that mtDNA tests are very likely diagnostic of natal populations. The mtDNA control region sequence is fixed for a single haplotype within most killer whale populations in the North Pacific. Lolita has the haplotype for Southern Residents, which is distinct from the haplotypes found in transient, offshore, and Northern Resident communities (including SE Alaska and Bering Sea). Based on sample sizes in studies to date, it is extremely unlikely that transient or Northern Residents have a Southern Resident haplotype that has gone undetected due to chance. Due to smaller sample sizes for offshores, it is harder to rule out that offshores might contain the Southern Resident haplotype in a small fraction of the population (i.e., 10 percent), but it has yet to be detected. The Southern Resident haplotype is shared with whales sampled off the Kamchatka Peninsula in Russia and from Prince William Sound in Alaska (Barrett-Lennard, 2000; Parsons et al., 2013), but additional data can be used to rule out the possibility that Lolita originated from these other populations. Using microsatellite

analysis, researchers assigned Lolita to population using different programs with varying probabilities and assessed kinship (Hoelzel et al., 2007; Pilot et al., 2010). In Pilot et al. (2010), Lolita was assigned to the Southern Resident population with the highest probability (0.464) and with low probability to Kamchatka (0.016) or SE Alaska residents (0.004). Tests for kinship found a putative match between Lolita and a member of the Southern Resident L pod based on one of four tests, but it was not a close relationship (e.g., parent, offspring, or full sibling). Lolita did not show potential kinship with individuals of any other population. Using a different analysis, Pilot et al. (2010) also assigned Lolita to a Southern Resident cluster and not to the Kamchatka cluster. The microsatellite data do not appear to provide conclusive evidence on their own to identify Lolita's population of origin, but they are consistent with her being a Southern Resident.

The peer review conclusions were that our status review update (NMFS, 2013) was overly simplistic, but likely correctly concluded that Lolita is a Southern Resident and that, taken together, the mtDNA and microsatellite DNA data provide a strong case for the assignment of Lolita to the Southern Resident population. As described above, we relied on information in the petition, public comments on the 90-day finding and the proposed rule, peer review and best available information, including peer reviewed journal articles and unpublished science reports and the recovery plan (NMFS, 2008) to inform our internal review and conclusions. Similar to the peer reviews and as raised in public comments, we acknowledge the uncertainty inherent in individual test results and observations; however, based on all of the best available scientific information, taken together, including results from multiple genetic studies, as well as other lines of evidence regarding capture and sighting history, we can be confident that Lolita

originated from the Southern Resident population (Ford, 2014). Differences in acoustic behavior between populations of resident killer whales also support the conclusion that Southern Resident killer whales are discrete and significant and, therefore, qualify as a DPS. Ford (1987) describes killer whale acoustic calls and how they can be identified to population and even to pod. While there is anecdotal information that Lolita shares acoustic characteristics with the members of the Southern Resident killer whale DPS found in the wild, this evidence is not as strong as the genetic data. In addition, morphological data, such as saddle patch pattern, are also consistent with, but not conclusive of, Lolita being a Southern Resident. This best available science supports Lolita's status as a member of the Southern Resident killer whale population.

Some commenters contend that Lolita not be included in the Southern Resident killer whale DPS, similar to other wild whales that are members of the North Pacific Resident subspecies (i.e., Northern Resident and Alaska Resident killer whale populations). These commenters fail to recognize the previously discussed best available science defining the genetic characteristics that Lolita shares with the Southern Resident killer whale DPS and often highlighted individual test results rather than all of the available scientific information taken together. We find the multiple genetic characteristics constitute compelling lines of evidence that render Lolita and other members of the Southern Resident killer whale DPS discrete from and significant to the North Pacific Resident subspecies (NMFS, 2013; Ford, 2014). Additionally, while the ESA authorizes the listing, delisting, or reclassification of a species, subspecies, or DPS of a vertebrate species, it does not authorize the exclusion of the members of a subset or portion of a listed species, subspecies, or DPS from a listing decision. In 2001, the U.S.

District Court in Eugene, Oregon (Alsea Valley Alliance v. Evans, 161 F. Supp.2d 1154 (D. Or. 2001)) (Alsea), ruled that once we had identified and listed a DPS (for Oregon Coast coho), the ESA did not allow listing only a subset (that which excluded 10 captive hatchery stocks) of that DPS. Accordingly, this case does not authorize the exclusion of Lolita from the Southern Resident Killer Whale DPS listing based on the best available science supporting her membership in the DPS.

Other comments note that there are other characteristics, such as behavior and habitat use, that Lolita does not share with the other wild members of the Southern Resident killer whales and suggest that NMFS could exercise its discretion to identify a separate captive only DPS. However, legislative history surrounding the 1978 amendments to the ESA that gave the Services the authority to identify DPSs indicates that Congress intended identification of DPSs to be used for the identification of wild populations, not separation of captive held specimens from wild members of the same taxonomic species (see Endangered Species Act Oversight: Hearing Before Senate Subcommittee on Resource Protection, Senate Committee on Environment and Public Works, 95th Cong. 50 (July 7, 1977)). Additionally, these arguments fail to adhere to Congress' directive to the Services that the authority to designate DPSs be exercised "sparingly" (Senate Report 151, 96th Congress, 1st Session). Finally, NMFS' decision making relevant to identifying a captive only DPS, in this context, is discretionary and not subject to judicial review (Safari Club International v. Jewell, 960 F. Supp. 2d 17 (DDC 2013)).

As described in the proposed rule (79 FR 4313; January 27, 2014), the ESA does not support the exclusion of captive members from a listing based solely on their captive

status. On its face the ESA does not treat captives differently. Rather, specific language in section 9 and section 10 of the ESA presumes their inclusion in the listed entity, and captives are subject to certain exemptions to section 9. Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of their captive status. However, section 9(b) provides certain exemptions from the 9(a)(1)(A) and (a)(1)(G) prohibitions for listed animals held in captivity or in a controlled environment as of the date of the species' listing (or enactment of the ESA), provided the holding in captivity and any subsequent use is not in the course of commercial activity. Additionally, section 9(b)(2) refers to captive raptors and identifies that the prohibitions in 9(a)(1) shall not apply to raptors legally held in captivity. Section 10(a)(1)(A) of the ESA allows issuance of permits to "enhance the propagation or survival" of the species. This demonstrates that Congress recognized the value of captive holding and propagation of listed species held in captivity but intended that such specimens would be protected under the ESA, with these activities generally regulated by permit.

We have specifically identified captive members as part of the listed unit during listing actions, such as for endangered smalltooth sawfish (68 FR 15674; April 1, 2003), and endangered Atlantic sturgeon (77 FR 5914; February 6, 2012), and in the final listing of five species of foreign sturgeon (79 FR 31222; June 2, 2014). Further, based upon the purposes of the ESA and its legislative history, courts have held and the USFWS has recently concluded that the ESA does not allow captive animals to be assigned different legal status from their wild counterparts on the basis of their captive status (Safari Club International v. Jewell, 960 F. Supp. 2d 17 (DDC 2013)). Subsequent to the submission of the petition regarding Lolita, USFWS published a proposed rule to amend the listing

status of captive chimpanzees, so that all chimpanzees (wild and captive) would be listed as endangered (78 FR 35201; June 12, 2013). USFWS also published a 12-month finding that delisting the captive members of three listed antelope species was not warranted (78 FR 33790; June 5, 2013).

In a recent notice announcing a Final Policy of Interpretation of the Phrase “Significant Portion of Its Range (SPR)” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species” (79 FR 37578; July 1, 2014), the Services also confirmed the legal status of captive members of listed species. The notice explains, with regard to species found in captivity, the Services consider a captive population to have no “range” separate from that of the species to which it belongs (captive populations cannot be considered a SPR). The notice also states “captive members have the same legal status as the species as a whole.”

Based on the preceding discussion, the information submitted during the public comment period, the peer reviews, and best available science and information, we find that captive members of the Southern Resident killer whale population should not be excluded from the listed Southern Resident killer whale DPS based on their captive status. Accordingly, this rule removes the exclusion for captive whales in the regulatory language describing the Southern Resident killer whale DPS. Our finding is consistent with the recent USFWS conclusions regarding the status of captive animals under the ESA and also with the Marine Mammal Commission recommendation to adopt a policy consistent with the USFWS in the proposed chimpanzee listing rule and treat all biological members of the Southern Resident killer whales as part of the DPS, regardless

of whether those individuals are in the wild or in captivity (Marine Mammal Commission letter, August 13, 2013).

As part of the 2005 ESA listing of the Southern Resident killer whale DPS (70 FR 69903; November 18, 2005), we conducted an analysis of the five ESA section 4(a)(1) factors and concluded that the DPS was in danger of extinction and listed it as endangered. In March 2011, we completed a 5-year review of the ESA status of the Southern Resident killer whale DPS, concluding that no change was needed in its listing status and that the Southern Resident killer whale DPS would remain listed as endangered (NMFS, 2011). The petition and several public comments included an analysis of the five ESA section 4(a)(1) factors with respect to Lolita, although petitioners note that the analysis is not required to justify Lolita's inclusion in the DPS and that Lolita's genetic heritage is sufficient to support her inclusion in the listing. We agree that biological information regarding Lolita's origin and consideration of the applicability of the ESA to captive members of endangered species provide a sufficient basis for our determination and, therefore, do not include a review of the section 4(a)(1) factors for Lolita or the wild population.

While progress toward recovery has been achieved since the listing, as described in the 5-year review, the status of the DPS remains as endangered. Since the 5-year review was completed, additional actions have been taken to address threats, such as regulations to protect killer whales from vessel impacts (76 FR 20870; April 14, 2011), completion of a scientific review of the effects of salmon fisheries on Southern Resident killer whales (Hilborn, 2012), and ongoing technical working groups with the Environmental Protection Agency to assess contaminant exposure. However, the

population growth outlined in the biological recovery criteria and some of the threats criteria have not been met. We have no new information that would change the recommendation in our 5-year review that the Southern Resident killer whale DPS remain classified as endangered (NMFS, 2011). This final rule amends the language describing the Southern Resident killer whale DPS by removing the exclusion of captive whales. With this change, Lolita, a female killer whale captured from the Southern Resident killer whale population in 1970, is not excluded from the Southern Resident killer whale DPS due to her captive status.

Effects of Amendment to Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include concurrent designation of critical habitat if prudent and determinable (16 U.S.C. 1533(a)(3)(A)); recovery plans and actions (16 U.S.C. 1536(f)); Federal agency requirements to consult with NMFS and to ensure its actions do not jeopardize the species or result in adverse modification or destruction of critical habitat should it be designated (16 U.S.C. 1536); and prohibitions on taking (16 U.S.C. 1538). Following the listing, we designated critical habitat and completed a recovery plan for the Southern Resident killer whale DPS. We issued a final rule designating critical habitat for the Southern Resident killer whale DPS November 29, 2006 (71 FR 69055). The designation includes three specific areas: (1) the Summer Core Area in Haro Strait and waters around the San Juan Islands; (2) Puget Sound; and (3) the Strait of Juan de Fuca, which together comprise approximately 2,560 square miles (6,630 square km). The designation excludes areas with water less than 20 feet (6.1 m) deep relative to extreme high water. The designated critical habitat will not be affected by removing the exclusion

of captive whales from the regulatory language describing the Southern Resident killer whale DPS. As the USFWS identified in its recent proposed chimpanzee rule, there is an “anomaly of identifying the physical and biological features that would be essential to the conservation of a species consisting entirely of captive animals in an artificial environment” (78 FR 35201; June 12, 2013). This observation also holds for a listed entity with only one captive member. In addition, the recent notice announcing a final policy interpreting Significant Portion of its Range under the ESA notes the Services consider a captive population to have no “range” separate from that of the species to which it belongs (79 FR 37578; July 1, 2014). We do not intend to modify the critical habitat designation to include consideration of Lolita and her captive environment.

After engaging stakeholders and providing multiple drafts for public comment, we announced the Final Recovery Plan for the Southern Resident killer whale DPS on January 24, 2008 (73 FR 4176). Lolita’s capture and captivity is mentioned in the recovery plan; however, the recovery actions in the plan are focused on addressing the threats to and the recovery of the wild population. As the recovery plan is updated in the future, we will consider including an update that Lolita is included in the DPS.

Sections 7(a)(2) of the ESA requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species, or to adversely modify critical habitat. In the USFWS proposed rule for chimpanzees (78 FR 35201; June 12, 2013), USFWS identifies that “the section 7 consultation process is not well suited to analysis of adverse impacts posed to a purely captive-held group of specimens given that such specimens are maintained under controlled, artificial conditions.” This observation also holds for a listed entity with only

one captive member. Previous guidance on examples of Federal actions that have the potential to impact Southern Resident killer whales was focused on activities that may affect wild whales. Additional considerations of actions that have the potential to affect Southern Resident killer whales, including Lolita, will be considered along with prohibitions on activities that affect the Southern Resident killer whale DPS. Some of these considerations are discussed below.

Take Prohibitions and Identification of Those Activities That Might Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and USFWS published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The ESA does not prohibit possession of animals lawfully taken into captivity, so a permit is required only if the person possessing the animal intends to engage in an otherwise prohibited act. Prohibited activities for ESA-listed endangered species include, but are not limited to: (1) “take” of such species, as defined in the ESA (including to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct); (2) delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce, in the course of a commercial activity, any such species; or (3) selling or offering for sale in interstate or foreign commerce any such species.

In the proposed rule, we said that, depending on the circumstances, we would not likely find continued possession, care, and maintenance of a captive animal to be a violation of section 9 (and that therefore, such activities would not require a section 10

permit). As noted above, we received numerous comments addressing the types of activities that might trigger section 9 concerns and/or warrant consideration for a section 10 permit. We believe these comments demonstrate the need for a more focused evaluation of these factors, which is more appropriately performed as part of a permit application process as opposed to this listing rule.

Likewise, we indicated in the proposed rule certain activities that we believe could result in violations of section 9 of the ESA, specifically including “releasing a captive animal into the wild.” 79 FR at 4318 (January 27, 2014). We based this on our proposed rule listing five species of sturgeon (since finalized at 79 FR 31222, June 2, 2014).

In this final rule, NMFS notes that issues surrounding any release of Lolita to the wild are numerous and complex and are not ripe for analysis in this listing rule. Such issues would be better evaluated in the context of a specific section 10 permit application. Any such process would include rigorous review by the scientific community, the Marine Mammal Commission, and the public, and be subject to an associated NEPA analysis, prior to action being taken.

References Cited

The complete citations for the references used in this document can be obtained by contacting NMFS (See ADDRESSES and FOR FURTHER INFORMATION CONTACT) or on our web page at:

http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/lolita_petition.html

Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106-554), is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the information on Lolita in our status review update (NMFS, 2013). Four independent specialists were selected from the academic and scientific community, Federal and state agencies, and the private sector for this review (with two respondents). All peer reviewer comments were addressed in this final rule. The peer review process is detailed at: http://www.cio.noaa.gov/services_programs/prplans/ID261.html.

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in Pacific Legal Foundation v. Andrus, 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions. (See NOAA Administrative Order 216-6.)

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore,

the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866. This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13122, Federalism

In accordance with E.O. 13132, we determined that this final rule does not have significant federalism effects and that a federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this final rule will be shared with the relevant state agencies in each state in which the species is believed to occur.

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, endangered and threatened species, reporting and recordkeeping requirements.

Dated: 2/4/15



Eileen Sobeck,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224- ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531-1543 and 16 U.S.C. 1361 *et seq.*

2. Revise the killer whale entry under § 224.101(h) to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(h) The endangered species under the jurisdiction of the Secretary of Commerce

are:

Species ¹					
Common name	Scientific name	Description of listed entity	Citation(s) for listing determination(s)	Critical habitat	ESA rules
Marine Mammals					
*	*	*	*	*	* *
Whale, killer (Southern Resident DPS)	<u>Orcinus orca</u>	Killer whales from the J, K, and L pods	[<u>Insert citation</u>][<u>Insert date of publication in the FEDERAL REGISTER</u>]	226.206	224.103
*	*	*	*	*	* *

¹Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).